IN THE

Supreme Court of the United States

October Term, 1971

No. 71-564

DISTRICT OF COLUMBIA,

Petitioner,

v.

MELVIN CARTER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion but its order dis-ing the complaint against the District of Columbia is forth at page 1b in Appendix B to the Petition for Writ Certiorari. The opinion of the Court of Appeals for the rict of Columbia Circuit is not yet reported in the Fed- Reporter, but is reproduced as Appendix A to the Peti- for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did the Court of Appeals err in deciding that the District of Columbia is a "person" for purposes of 42 U.S.C. 1983, in view of the facts that (a) local law recognizes municipal liability in the circumstances of this case, and (b) the legislative history of the statute indicates that Congress intended to extend immunity only to those state municipalities which possessed immunity under local common law and over whose common law liability Congress possessed no legislative jurisdiction?

STATUTES INVOLVED

42 U.S.C. §1983 is the only statute involved. It is reproduced in its entirety at page two of the Petition.

ARGUMENT

The petitioner fails to present any question of sufficient importance to warrant further review by this Court. The ruling below was founded upon two separate and independent grounds. First, the Court reasoned that the exemption of municipalities from the operation of 42 U.S.C. §1983, mandated by this Court in *Monroe v. Pape*, 365 U.S. 167 (1961), was founded upon Congress's intent to leave questions of municipal liability and immunity to the exclusive control of the states. Since the sovereign immunity of the District of Columbia has been largely abolished, except for acts committed in the exercise of discretionary functions,

Spencer v. General Hospital, 138 U.S. App. D.C. 48, 425 F.2d 479 (1969) (*en banc*), the rationale of *Monroe* is inapplicable to the District. Accordingly, there is no reason to exclude the District from the class of possible defendants in lawsuits seeking damages for personal injuries under Section 1983, and there is no basis for claiming that Congress intended so to exclude the District.

The Court below also pointed out that *Monroe* was distinguishable on the basis of the unique relationship between Congress and the District. The *Monroe* ruling, relying as it does upon extensive debates in the post-Civil War Congress which adopted Section 1983, reflects the then current notion that it was beyond Congress' Constitutional powers to interfere substantially with the control the states have over their powers of appropriations and taxation by imposing new liability upon governmental entities which are creatures of the states themselves. This constitutional concern could not, of course, have any effect on Congress' dealings with the District of Columbia, since Congress has always had complete legislative jurisdiction over the District.

It is the second of these two independent bases of decision which makes this case entirely distinguishable from *Monroe v. Pape, supra*, and its progeny. All of the cases following *Monroe*, notably *United States ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84 (3d Cir. 1969) and *Dodd v. Spokane County, Washington*, 393 F.2d 330 (9th Cir. 1968), have involved municipalities created by the states in which they are located and having substantial independence from the federal government in the exercise of their governmental jurisdiction. In none of those cases has there been independent analysis of the holding or underlying rationale of *Monroe*. Rather, the application of the rule has

been mechanical, as indeed it should be, since there is no relevant basis for distinguishing the municipalities involved. The District of Columbia, however, falling wholly within the jurisdiction of Congress, as it does, is clearly distinguishable from all other municipalities, and that distinction leads ineluctibly to the conclusion that the District may be subject to liability under §1983 while Chicago may not. There is, accordingly, no conflict between the decision of the District of Columbia Circuit in this case and the decision of this Court in *Monroe v. Pape, supra,* or the decisions of other Courts of Appeals. *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959); *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559 (1934).

For similar reasons, Petitioner's claim of a conflict with the decision of the Ninth Circuit in *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968) and the decision of the Sixth Circuit in *Patrum v. City of Greensboro*, 419 F.2d 1300 (6th Cir. 1969), is without merit. The holdings of those cases are accurately stated in the Petition. That they do not conflict with the holding of the District of Columbia Circuit in this case, however, is clear from a consideration of the second basis for the District of Columbia Circuit's decision. The Ninth and Sixth Circuits held that "the Monroe rationale does not cease to be applicable where the governmental unit involved may be compelled to respond in damages under the laws of the state in which it is located." Petition, pp. 5-6. But because of Congress' peculiar relationship with the District and because Congress has complete control of the District's power to raise and expend revenues, the rationale of the *Monroe* decision, as indicated above, is inapplicable to the District of Columbia. The decisions of the Ninth and Sixth Circuits dealt only with municipalities created by states, whereas the decision below dealt with the one municipality created by Congress.

This difference in the identities of the creators of the municipalities involved is fundamental. What the District of Columbia Circuit has to say about the liability and immunity of the District of Columbia under Section 1983 has absolutely no effect upon the liability and immunity of the Town of Caliente or the City of Greensburg under that same section. Contrary to petitioner's claim, the purported conflict among the Circuits thus does not lead to different results in identical cases, dependent upon the Circuit in which the suit was instituted, and there is accordingly no need for this Court to review the decision below. *Commissioner v. Factor*, 364 U.S. 932 (1961), *Factor v. Commissioner*, 364 U.S. 933 (1961).

Finally, petitioner attempts to invoke the certiorari jurisdiction of this court on the ground that the ruling below will subvert the intent of the District of Columbia Court Reform and Criminal Procedures Act of 1970, P.L. 91-358, to transfer common law actions of this type against the District Court to the Superior Court. It is clear, however, that under Rule 20 of the Federal Rules of Civil Procedure those who have a right of action under Section 1983 against officers of the District of Columbia Government could sue those officers in the District Court and join their common law claims against the District under theories of pendant jurisdiction. *Hurn v. Oursler*, 289 U.S. 238 (1933); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968), *Gitmore v. James*, 274 F. Supp. 75 (N.D. Texas 1967), *aff'd*, 389 U.S. 572 (1968). Accordingly, the amenability of the District to suit in the District Court is essentially unaffected by the decision.

CONCLUSION

Petitioner has failed to advance any argument justifying further review of this case by this Court. The questions it claims to present are notably devoid of any importance beyond the boundaries of the District of Columbia, and even that importance is minimal. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JERRY M. HAMOVIT
1801 K Street, N. W.
Washington, D. C. 20006
Attorney for Respondent

Of Counsel
RALPH J. TEMPLE
American Civil Liberties Union Fund
1424 16th Street, N.W.
Washington, D.C.

Supreme Court of the United States

October Term 1971

No. 71-564

DISTRICT OF COLUMBIA, *Petitioner*,

v.

MARIE CATON, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

C. FRANCIS HURLEY,
Corporation Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation Counsel, D. C.

DAVID P. SUTTON,
Assistant Corporation Counsel, D. C.

Attorneys for Petitioner,
District Building,
Washington, D. C. 20004.

Petition for Certiorari Filed October 21, 1971
Certiorari Granted January 10, 1972

INDEX

Subject Index

Cases Cited

UNITED STATES CODE CITED

DISTRICT OF COLUMBIA CODE, 1967, CITED

INDEX—Continued

Acts of Congress Cited

Other Authorities Cited

Supreme Court of the United States

TERM 1971

No. 71-564

DISTRICT OF COLUMBIA, *Petitioner*,

v.

MELVIN CARTER, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the court of appeals is reported at 447 F. 2d 358 and is contained in the appendix to the certiorari petition at 1a.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1971 (C. A. at 1c). The petition for a writ of certi-

[1] References to the appendix to the certiorari petition will hereinafter be prefaced with the designation "C. A.," and references to the single appendix will be prefaced with the designation "A."

orari was filed on October 21, 1971, and granted on January 10, 1972. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

STATUTE INVOLVED

R. S. § 1979, 42 U. S. C. § 1983. Civil Action for Deprivation of Rights.

> "Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis supplied.)

QUESTION PRESENTED

Whether the District of Columbia, as a congressionally-created municipal corporation, is a "person" within the meaning of R. S. § 1979, 42 U. S. C. § 1983.

STATEMENT

In a civil action filed in the United States District Court for the District of Columbia on February 12, 1969, respondent sought to recover damages for alleged assault and battery, deprivation of civil rights, and negligence. Named as defendants were the District of Columbia, a municipal corporation, the Chief of the Metropolitan Police Department, a police precinct captain, and a police officer (A. 1, 2-4, 5).

Respondent alleged in his amended complaint that in 1968 he was assaulted by the police officer who, "acting

under color of law and in his capacity as a police officer," beat him with brass knuckles while he was held by two other officers, and arrested him without justification or probable cause. Respondent further alleged that the precinct captain, the Chief of Police, and the District of Columbia negligently failed to train, instruct, supervise, and control the officer with regard to the circumstances in which (1) an arrest may be made, and (2) various degrees of force may be used in making an arrest. Respondent asserted both a common law theory of tort liability and an action for deprivation of civil rights under R. S. § 1979, 42 U. S. C. § 1983. (A. 2-4, 5.)

The police officer was never found for service of process. The precinct captain and the Chief of Police moved to dismiss the complaint on the grounds that it failed to state any basis for relief, and that they were protected by the doctrine of official immunity. The District of Columbia moved to dismiss the complaint for failure to state a claim and also on the ground of sovereign immunity (A. 4). The District Court subsequently dismissed the complaint as to all defendants (A. 5).

On July 23, 1971, the United States Court of Appeals for the District of Columbia Circuit reversed the orders of the District Court. Respecting the District's asserted tort liability, the court held that, although a municipal corporation, the District was nonetheless a "person" amenable to respondent's action for damages under R. S. § 1979, 42 U. S. C. § 1983 (C. A. 18a-22a). The court also held that the District could not escape liability under the doctrine of sovereign immunity, even though the United States would be immune from liability under similar circumstances under the Federal Tort Claims Act, 42 U. S. C. § 2680(h) (C. A. 12a-18a).

SUMMARY OF ARGUMENT

The ruling of the court of appeals that the District of Columbia, as a congressionally-created municipal corpora-

tion, is a person within the meaning of R. S. § 1979, 42 U. S. C. § 1983, cannot be squared with the legislative history of that enactment and with this Court's holding in *Monroe* v. *Pape*, 365 U. S. 167 (1961). Each makes plain that, in specifically rejecting a proffered amendment designed to bring municipalities within the reach of R. S. § 1979, Congress adopted an across-the-board rule of municipal non-liability in federal courts.

The court of appeals concluded that under *Monroe* municipalities are immune from liability under R. S. § 1979 *only* to the extent that they enjoy immunity under local law, and additionally concluded that, because the doubt of Congress as to its constitutional power to impose new liability on municipalities would not extend to the District of Columbia, Congress intended to impose liability on the District under R. S. § 1979. Both of these conclusions are erroneous.

Although the applicability of the immunity doctrine to the issue of municipal liability under R. S. § 1979 was urged to this Court in *Monroe*, this Court's construction of R. S. § 1979 was in no way based on local immunity considerations, but on legislative history which demonstrates a congressional intent to unqualifiedly exempt municipalities from liability. Moreover, the lower court's holding that local immunity considerations must serve as the guide to construction of R. S. § 1979 is in irreconcilable conflict with the established doctrine of uniformity in the application of federal civil rights legislation.

The court's holding that Congress included the District within R. S. § 1979 by virtue of its special legislative power over the District under the Constitution is necessarily based on the premise that Congress intended to single out the District among all other governmental bodies in the creation of the new kind of federal liability envisioned by R. S. § 1979. That premise will find support neither in the legis-

debates on R. S. § 1979, nor in the historical background which gave rise to its enactment.

Finally, because R. S. § 1979 is concerned with actions taken under color of state law, as opposed to actions interlocked with congressionally enacted legislation, it has no application where, as here, the action complained of is attributed to a congressionally-created police department, charged with the task of enforcing Acts of Congress and implementing regulations in the federal city.

ARGUMENT

The District of Columbia, as a congressionally-created municipal corporation, is not a "person" within the meaning of R. S. § 1979, 42 U. S. C. § 1983.

The District of Columbia challenges the ruling of the court of appeals that it is a "person" within the meaning of R. S. § 1979, 42 U. S. C. § 1983, which reads as follows:

> "Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis supplied.)

R. S. § 1979 was enacted into law as § 1 of the Ku Klux Act of 1871, 17 Stat. 13. As noted by this Court in *Monroe v. Pape*, 365 U. S. 167 (1961), upon a review of pertinent legislative history, the Ku Klux Act was the response of Congress to a problem of widespread violence in the South and the inability or unwillingness of public officers to enforce state laws in a manner which adequately dealt with such violence. 365 U. S. at 172-180. R. S. § 1979 was de-

signed to afford a federal right in a federal court to persons whose constitutional rights were being violated under color of state law. 365 U. S. at 178-180, 183. It combined with various other sections of the Ku Klux Act which were designed, *inter alia*, to punish conspiracies to interfere with federal or state officials in the performance of their duties, and conspiracies to deny individuals equal protection of the laws (§ 2); to permit the President to intervene with federal military forces when domestic violence so obstructed law enforcement as to deprive citizens of their constitutional rights, under circumstances where state officials could not or would not protect these rights (§ 3); and to authorize the President to suspend the writ of habeas corpus when unlawful combinations rose to the level of rebellion against the government of the United States (§ 4). See Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light On State Action On The Fourteenth Amendment*, 11 St. L. L. J. 331 et seq. (1967).

After considerable congressional debate on various features of the 1871 Act, Senator Sherman of Ohio twice proposed an amendment to R. S. § 1979 which would have expanded that section's coverage to make municipalities as well as individuals subject to suit in a federal court for civil rights deprivations. But Congress twice rejected such a proposal (Cong. Globe, 42nd Cong., 1st Sess. at 663, 725, 749, 755, 800, 801, 804). And see 11 St. L. L. J. at 368-376. It is the position of the District of Columbia that, as a congressionally-created municipal corporation, it is not a "person" within the meaning of R. S. § 1979, and that the contrary ruling of the court of appeals cannot be squared with this Court's holding in *Monroe* v. *Pape*.

In *Monroe*, as in this case, R. S. § 1979 was invoked in an attempt to subject a municipality (the city of Chicago) to tort liability in a federal court for alleged police misconduct. There, as here, the Court was concerned with the question of whether a municipality was a "person" within

the meaning of that enactment. In urging to the Court that the statute envisioned governmental as well as individual liability, the petitioners in *Monroe* (brief at 28-30) placed great reliance on an Act of Congress entitled "An Act Prescribing the Form of the Enacting and Resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof," passed on February 25, 1871, just seven weeks prior to R. S. § 1979. This enactment provided, *inter alia*, that "the word 'person' may extend and be applied to bodies politic and corporate." 16 Stat. 431. This Court unanimously held, however, that this statutory definition was not controlling, thus rejecting the notion that "bodies politic and corporate" are persons within the meaning of R. S. § 1979 (365 U. S. at 190-191). In so holding, the Court emphasized the defeat by Congress of two different versions of the amendment proposed by Senator Sherman of Ohio whereby municipalities were to be held liable for certain acts of violence occurring within their boundaries, and the substitution in place of the Sherman amendment of a provision extending liability in damages to " 'any person or persons, having knowledge that any' of the specified wrongs are being committed" (365 U. S. at 188-190).[2] Based upon its extensive exami-

[2] This congressional substitution of the individual liability concept for the governmental liability concept is traceable to § 6 of the 1871 Act, now R. S. § 1981, 42 U. S. C. § 1986. The language of § 6 is wholly consistent with the position expressed by numerous lower federal courts that the 1871 Act provides for relief only against individuals personally involved in the deprivation of constitutionally protected rights, and as such cannot give rise to liability on a *respondeat superior* theory, even apart from its inapplicability to governmental bodies. See, for example, *Adams* v. *Pate*, 445 F. 2d 105 (7th Cir., 1971); *Bennett* v. *Gravelle*, 323 F. Supp. 203, 214 (D. Md., 1971); *Palermo* v. *Rockefeller*, 323 F. Supp. 478, 483 (S. D. N. Y., 1971); *Boreta* v. *Kirby*, 328 F. Supp. 873, 874 (N. D. Cal., 1971); *Barrows* v. *Faulkner*, 327 F. Supp. 1190 (N. D. Ohio, 1971); *Sanburg* v. *Daley*, 306 F. Supp. 277, 278 (N. D. Ill., E. D., 1969); *Fanburg* v. *City of Chattanooga*, 330 F. Supp. 1047 (E. D. Tenn., S. D., 1968); *Salazar* v. *Dowd*, 256 F. Supp. 220, 223 (D. Colo., 1966); *Jordan* v. *Kelly*, 223 F. Supp. 731 (W. D. Mo., W. D., 1963); see also 11 St. L. L. J. at 374-376. The contrary notion expressed by the court of appeals (C. A. App. 72a, n. 39) will find support only in a distinct minority of the reported decisions.

nation of legislative history, the Court attributed to Congress, in rejecting the Sherman amendment, a clear intent to limit the application of the term "person" to individuals, as opposed to governmental entities.

To be sure, the District of Columbia, as a congressionally-created municipal corporation, is and has been since its creation a body "politic and corporate." See *Barnes* v. *District of Columbia*, 91 U. S. 540 (1875); *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1 (1889); *District of Columbia* v. *Thompson Co.*, 346 U. S. 100 (1953). Consequently, when the Court unanimously rejected the notion that Congress, in enacting R. S. § 1979, intended to include "bodies politic and corporate" within the meaning of the word "person," the Court adopted a principle necessarily applicable to the District of Columbia in this case. And when Congress, in rejecting the Sherman amendment, evidenced its intent to draw a clear line of demarcation between persons and governmental entities within the meaning of R. S. § 1979, Congress effectively negated the notion that the District logically falls within the reach of that statute.

The court of appeals gave "two independent reasons" (C. A. 19a) for its holding that the District of Columbia is a "person" within the meaning of R. S. § 1979 and thus subject to suit for damages thereunder:

First, that *Monroe* held that municipalities are immune from liability under R. S. § 1979 *only* to the extent that they enjoy immunity under local law (C. A. 18a-20a).

Second, that because the reason Congress excluded municipalities from the scope of R. S. § 1979, i.e., doubt that it could constitutionally impose new liability on municipalities, does not apply to the District of Columbia, Congress intended to impose liability on the District under R. S. § 1979 (C. A. 21a).

The District submits that any objective analysis of these reasons will inexorably lead to the conclusion that they

emasculate the construction placed on R. S. § 1979 by the Court in *Monroe*. Each of the reasons will be separately discussed.

A

R. S. § 1979 does not incorporate municipal immunity under local law.

There are a number of reasons why the notion that R. S. § 1979 incorporates municipal immunity under local law should not be countenanced by this Court.

First, if the ruling of the court of appeals in favor of such incorporation is correct, it is only because Congress so intended. However, a consideration of the legislative history of R. S. § 1979 will lend no support to such a congressional intent. When the 1871 Congress enacted R. S. § 1979, there was no ironclad rule of municipal immunity or municipal non-immunity. The decisions of this Court tell as much. See, e.g., *Barnes* v. *District of Columbia*, *supra*, 91 U. S. at 551; *Fowle* v. *Alexandria*, 28 U. S. (3 Pet.) 398 (1830). Certainly then, it should not be presumed that Congress was oblivious to existing law at the time it enacted R. S. § 1979. Indeed the debates on the Sherman amendment stand as clear congressional recognition that some municipalities were then subject to liability under state law in connection with the very subject matter of that amendment, whereas other municipalities were not locally subjected to this kind of liability. (Cong. Globe, 42nd Cong., 1st Sess. at 751, 752, 757, 760, 761, 762, 765, 771, 772, 773, 788, 791, 794, 798, 799, 800.) Had it deemed it appropriate, Congress could have provided in R. S. § 1979 that municipalities would be subject to suit in federal courts to the extent that local law recognizes their liability, but the fact is that Congress did not so provide. Clearly, then, the lower court's attempt to infer from congressional silence an intent to significantly alter the Federal-State balance

and to thus substantially extend federal judicial resources is plainly unjustified. Cf. *United States* v. *Bass*, —— U. S. —— (No. 70-71, decided December 20, 1971, slip op. at 12-14).

In asserting that the congressional rejection of the municipal liability concept was based on constitutional considerations "designed to avoid interfering with the liability of municipal governments," and in thus making the immunity doctrine the controlling standard for determining municipal liability under R. S. § 1979 (C. A. at 19a-20a), the court of appeals plainly placed unjustified reliance on the *motive* of Congress in disregard of the *intent* or *purpose* of Congress in legislating as it did. In this respect, the court obviously failed to distinguish between *what* Congress actually did and *why* it did it. And "[i]n a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect, whatever may have been the motives upon which legislators acted." *New York State* v. *Roberts*, 171 U. S. 658, 681 (1898) (Mr. Justice Harlan dissenting). Accord *Palmer* v. *Thompson*, 403 U. S. 217, 224-226 (1971). The natural and reasonable effect of R. S. § 1979, when considered in light of the legislative debates on the Sherman amendment, was the unqualified adoption by Congress of a uniform federal rule of municipal non-liability, and that rule cannot be modified by any constitutional considerations which may have motivated Congress to exclude municipalities from the reach of R. S. § 1979.

Second, the question of the impact of the doctrine of sovereign immunity on the construction of R. S. § 1979 was, in fact, tendered to the Court in *Monroe* v. *Pape*. In their brief, petitioners, citing many authorities dealing with the application of the doctrine, asserted that the doctrine was obsolete and unjust, and called upon the Court to adopt a construction of R. S. § 1979 whereby state law rules of municipal immunity should not be permitted to control the ap-

pretation of R. S. § 1979 (brief for petitioners at 23-24, 34-36). In answering this argument, respondents pointed to an Illinois statute removing "from Chicago governmental immunity for the acts of its police except where such acts are the result of 'willful misconduct,'" and urged that the city could not be held responsible in federal courts for *ultra vires* acts of its police in contravention of state and local laws (brief for respondents at 3, 24-28). But the Court did not rule in favor of municipal non-liability because the city of Chicago was immune from suit under local law, and the Court in no way suggested that the question of municipal immunity under local law should be linked to the question of municipal liability under R. S. § 1979. Instead, the Court ruled in favor of across-the-board municipal non-liability. In an era concerned with an evolving concept of municipal immunity, it is inconceivable that the Court would have failed to incorporate the immunity doctrine into R. S. § 1979 (and thus base its decision on a narrower ground) if the Court then believed that such incorporation was required by the legislative history of that enactment. It is submitted that the very failure of the Court to place such a qualified construction on R. S. § 1979 is a tacit rejection of the rationale embraced by the court of appeals.[8]

Third, the lower court's construction of R. S. § 1979 as incorporating local law applicable to municipal immunity is inconsistent with the established principle that federal law should be uniform. Or as Mr. Justice Jackson noted

---

[8] The District is unaware of any other circuit court of appeals ruling which agrees with the lower court's ruling that municipalities are persons within the meaning of R. S. § 1979, to the extent that they lack immunity from suit under local law. Two circuit courts of appeals have expressed a contrary view. See: *Brown* v. *Town of Caliente, Nevada*, 392 F. 2d 546 (9th Cir., 1968); *Patrum* v. *City of Greensburg, Kentucky*, 419 F. 2d 1300 (6th Cir., 1969).

in his concurring opinion in *D'Oench, Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447, 471-472 (1942):

> "* * * Federal law is no judicial chameleon changing complexion to match that of each state wherein lawsuits happen to be commenced * * *."

And in *Jerome* v. *United States*, 318 U. S. 101, 104 (1943), the Court said:

> "* * * But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. * * *"

Accord: *N.L.R.B.* v. *National Gas Utility District*, 402 U. S. 600, 603 (1971). And see *Workman* v. *New York City*, 179 U. S. 552 (1900). See also brief for petitioners in *Monroe* at 52-58.

The uniformity principle is certainly no less applicable where, as here, the case involves a Civil Rights Act of national application. As pointed out in *Basista* v. *Weir*, 340 F. 2d 74, 86 (3rd Cir., 1965):

> "The Civil Rights Acts were brought into being at a critical time in the history of the United States following the Civil War. They were intended to confer equality in civil rights before the law in all respects for all persons embraced within their provisions. We believe that the benefits of the Act were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from the state to state * * *."

And in *Monroe*, this Court found "three main aims" of the 1871 Act: to override certain kinds of state laws, to provide a remedy where state law was inadequate, and to provide a remedy where the state remedy, though adequate in theory, was not available in practice. 365 U. S. at 173-174. Manifestly, then, the 1871 Congress did not intend to make federal remedies depend on state law, but consistent with the principle of federal uniformity, intended to afford the same type of relief to persons residing within the various states. In clear contravention of that principle, the court below would condition the reach of the federal remedy under R. S. § 1979 on the judgments of local legislators, permitting them to expand or contract such a remedy as they see fit at any given time in history.[4] Any fair consideration of such a notion in light of this Court's ruling in *Monroe* will inexorably compel the conclusion that, in the judgment of the 1871 Congress, there was to be across-the-board governmental non-liability.

The District is not unmindful of those post-*Monroe* commentaries which assert, in effect, that this Court should overrule *Monroe* by holding that municipalities are persons within the meaning of R. S. § 1979, to the extent that they lack immunity from tort liability under local law. See Kates and Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. Cal. L. Rev. 131 (1972); Note: *Developing Governmental Liability Under 42 U. S. C. § 1983*, 55 Minn. L. Rev. 1201 (1971);

---

[4] Because the intent of Congress was to completely exclude municipal liability from the reach of R. S. § 1979, the incorporation of local immunity principles into that statute by force of 42 U. S. C. § 1988 would amount to a clear conflict with the federal policy manifested in R. S. § 1979 as opposed to merely a mere deficiency in remedy. The contrary rationale of the court of appeals (C. A. at 20a) plainly sanctions the borrowing of a state remedy "inconsistent with the * * * laws of the United States * * *" and is thus in variance with 42 U. S. C. § 1988. Compare *Baker* v. *F & F Investment*, 420 F. 2d 1191 (7th Cir., 1970), cert. denied, 400 U. S. 821 (1970), with *Wilder* v. *Gain*, 311 F. Supp. 754 (N. D. Cal., 1970).

Comment: *Suing Public Entities Under the Federal Civil Rights Act: Monroe v. Pape Reconsidered*, 43 U. Col. L. Rev. 105 (1971). But as this Court has made plain, where, as here, the issue is one of interpretation of a statute readily susceptible of legislative amendment, as opposed to interpretation of the Constitution, a departure from a previous decision cannot be justified unless it appears beyond doubt that such decision misapprehended the meaning of the applicable statute. *Monroe* v. *Pape*, 365 U. S. at 185; *id.* at 192 (concurring opinion of Mr. Justice Harlan). Clearly, that is not the situation here. And as the commentators also note (45 S. Cal. L. Rev. at 144, 55 Minn. L. Rev. at 1209, n. 37), while the United States Commission on Civil Rights, in 1961 and again in 1965, recommended that *Monroe* be legislatively reversed by an appropriate amendment to R. S. § 1979, no such amendment has yet been adopted by Congress.

B

The District's status as a federally-created municipal corporation does not bring it within the reach of R. S. § 1979 as construed by this Court.

Adverting to this Court's ruling in *Monroe*, the court of of appeals asserted that the basis for rejection of municipal liability under R. S. § 1979 was that Congress doubted its constitutional power to impose a new liability on state-created municipalities. The court then reasoned that, because Congress could entertain no such constitutional doubt concerning its authority to legislate for the District, under Article I, Section 8, Clause 17, of the Constitution, Congress intended to subject the District to liability under R. S. § 1979 (C. A. at 21a). But it by no means follows, however, that Congress intended to make R. S. § 1979 applicable to the District, simply because it had the power to do

Here again the court has placed unjustified and erroneous reliance on the *motive* of Congress as distinguished from its legislative *purpose* (see cases cited at 10, *supra*). As previously pointed out, *Monroe* makes plain that the rejection by Congress of the Sherman amendment and the substitution in its place of language of individual liability in § 6 of the 1871 Act (R. S. § 1981, *supra*) is indicative of a legislative purpose to draw a clear line of demarcation between personal and governmental liability under R. S. § 1979. The constitutional motive of Congress for doing so certainly should not require a departure from the construction given R. S. § 1979 in *Monroe* simply because the municipality involved here is federally created.

The conclusion that Congress intended to bring the District within the purview of R. S. § 1979 because the District is a municipality of its own creation necessarily involves the conclusion that, in spite of its rejection of the concept of governmental liability as envisioned by the Sherman amendment, Congress intended to create an exception for the District, thus setting it apart from all other governmental bodies. In this connection, the court of appeals concedes, as it must, that under *Monroe* state-created municipalities are not persons under R. S. § 1979. But it is equally clear from *Monroe* that the concept of federalism, on which rejection of the Sherman amendment was based, requires the conclusion that neither a state nor any of its political subdivisions are persons within the meaning of that enactment. 365 U. S. at 190-191. See also comments of Representative Willard, Cong. Globe, 42nd Cong. 1st Sess. at 791; comments of Representative Poland, *id.* at 793 (cf. J.A. at 21a). And since the United States is not a person within the ambit of R. S. § 1979,[5] the notion that Congress

---

[5] In numerous post-*Monroe* decisions, lower federal courts have held that the assumption recognised in that case is applicable to governmental entities in general, whether federal, state, or local in nature. See, for example, *Zuckerman v. Appellate Division, etc.*, 421 F. 2d 625 (2nd Cir., 1970); *Accardi* v.

Continued on page 16

intended to single out the District as the sole governmental body for inclusion in R. S. § 1979, if valid, should surely find clear support in the legislative history of that enactment. But the court of appeals did not, and indeed could not, point to any legislative history which attributes to Congress an intent to engage in any such singling out. And the debates on the Sherman amendment makes it plain that the concern of Congress was whether to extend R. S. § 1979 to include municipal liability in general, not whether to distinguish among particular governmental bodies in the creation of federal liability. See 11 St. L. L. J. at 368-376. In the absence of legislative history expressing a contrary intention, the conclusion that Congress, by its silence, intended the unique result of including the District within R. S. § 1979, while excluding all other governmental bodies from its coverage, is plainly unjustified. Cf. *Schilb* v. *Kuebel*, —— U. S. —— (No. 70-90, decided December 20, 1971, slip op. at 14).

In *Bolling* v. *Sharpe*, 347 U. S. 497 (1954), this Court held that the concept of constitutional equality requires that the District's civil rights obligations respecting school desegregation be measured by the same criteria that applies to other governmental entities throughout the nation. The same considerations should be no less appropriate in determining the inapplicability to the District of R. S. § 1979.

Nor is there any logical reason why the 1871 Congress would have singled out the District for special legislative

---

Continued from page 15

United States, 435 F. 2d 1239, 1241 (3rd Cir., 1970); *United States ex rel. Gilliemacker* v. *County of Philadelphia*, 413 F. 2d 84, 86 (3rd Cir., 1969); *Dodd* v. *Spokane County, Washington*, 393 F. 2d 330, 334 (9th Cir., 1968); *Wilford* v. *California*, 352 F. 2d 474, 476 (9th Cir., 1965); *Bennett* v. *Gravelle*, 323 F. Supp. 208 (D. Md., 1971), and cases cited at 211; *Toa Baja Development Corporation* v. *Garcia Santiago*, 313 F. Supp. 899 (D. Puerto Rico, 1970), and cases cited at 903. See also: Note: *Civil Rights—School Officials Not Persons For Purpose of Section 1983, Regardless of Relief Sought*, 24 Southwestern L. J. 360 at 362 (1970); cf. Comment, *Injunctive Relief Against Municipalities Under Section 1983*, 119 U. Pa. L. Rev. 389 at 390 (1970).

consideration in enacting R. S. § 1979. As the Court made plain in *Monroe*, the general aim of the 1871 Act, of which R. S. § 1979 is a part, was to provide for federal controls because of an inability of state governments to cope with those violating the civil rights of others within their respective territorial limits (365 U. S. at 172-176). Yet, the applicability of this rationale to the District of Columbia would be tantamount to a congressional recognition that pre-existing controls in the federal city were inadequate in the absence of the 1871 Act. Certainly, the Reconstruction Congress had no such notion in mind.

In the decade preceding enactment of the 1871 Act, Congress articulated a distinct legislative policy designed to implement civil rights in the District of Columbia. By successive Acts, Congress abolished slavery in the District of Columbia (Act approved April 16, 1862, 12 Stat. 376); made all District residents amenable to civil laws, ordinances and penalties without regard to race (Act approved May 21, 1862, 12 Stat. 407); prohibited racial discrimination in District of Columbia street car transportation (Act approved March 3, 1865, 13 Stat. 536); and provided that individuals shall be entitled to vote in any election in the District without distinction on account of color or race (Act approved January 8, 1867, 14 Stat. 375).[8] These matters, unlike the matters which prompted enactment of the Ku Klux Act of 1871, obviously commended themselves to the specific concern of Congress as the District's legislative body.

Moreover, as this Court also emphasized in *Monroe:*

> "• • • It is abundantly clear that one reason the [1871] legislation was passed was to afford a

[8] In the Organic Act of February 21, 1871, 16 Stat. 419, which established the District of Columbia as "a body corporate for municipal purposes," Congress vested legislative power and authority in a Legislative Assembly consisting of a Council and a House of Delegates. In 1872 and 1873, that legislative body passed the Acts prohibiting racial discrimination on the part of proprietors of restaurants with which this Court was concerned in *District of Columbia* v. *Thompson Co.*, *supra*.

federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." (365 U. S. at 180; emphasis supplied.)

Prior to 1871, however, Congress had provided for a court system in the federal city which combined the powers and jurisdiction of a local court system with the powers and jurisdiction of a Circuit and District Court of the United States. See Act of March 3, 1863, 12 Stat. 762-765; and see Noel, *The Court House of the District of Columbia*, Law Reporter Printing Co., Washington, 1939, at 53, 66. Certainly, in enacting R. S. § 1979, Congress had no reason to confer judicial remedies which then pre-existed at the seat of government.[7]

Clearly, therefore, any fair consideration of the concerns of the 1871 Congress to override certain kinds of state laws (365 U. S. at 173), to afford a then non-existent right in a federal court (365 U. S. at 178-180), and to create federal law enforcement controls in the absence of adequate state controls (365 U. S. at 172-176), will render inescapable the conclusion that the 1871 Congress had no valid reason

---

[7] With the advent of the recently enacted District of Columbia Court Reform and Criminal Procedure Act of 1970, P. L. 91-358, 84 Stat. 473 et seq., the notion that Congress intended to permit plaintiffs in cases like the instant one to elect whether to sue in the United States District Court for the District of Columbia or in the District of Columbia Superior Court is even less compelling. In that Act, Congress transferred a wide range of jurisdiction over local matters from the District Court to the Superior Court. 84 Stat. at 484-485. But, in spite of the fact that the Superior Court is fully equipped to dispense justice in cases like the intant one, respondent and many others may continue to seek damages against the District of Columbia in the District Court in myriad types of civil rights actions under R. S. §-1979, if the ruling of the court of appeals is allowed to stand.

for including the District as the sole governmental entity within the ambit of R. S. § 1979.

There is additional reason for the inapplicability of R. S. § 1979 in this case, even apart from the notion that, as a governmental body, the District is not a person within the purview of that enactment. As this Court has made plain, R. S. § 1979 is concerned with actions taken under color of state law, but not with actions interlocked with laws enacted by Congress. See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 650 (1963); see also: *Williams* v. *Rogers*, 449 F. 2d 513, 517 (8th Cir., 1971). The action of which repondent essentially complains arose out of the performance of duty by a member of the Metropolitan Police Department at the seat of government. That Department was created by Congress. See R. S. D. C. § 321, § 4-101, D. C. Code, 1967. Its functions involve the enforcement of Acts of Congress and implementing regulations promulgated pursuant to congressionally conferred authority. As such, its operation constitutes a derivative type of sovereignty traceable to the constitutional power of Congress to legislate exclusively for the District of Columbia. In *Metropolitan R. Co.* v. *District of Columbia, supra*, this Court said (132 U. S. at 9):

> "• • • • the sovereign power of • • • [the District] is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. • • •"

This Court went on to note that "crimes committed in the District are not crimes against the District but against the United States" (*id.*). To be sure, if respondent had complained of law enforcement-related misconduct on the part of a United States Park policeman, a United States Capitol

policeman, or any other law enforcement officer associated with the United States government, there would be no action under color of state law within the meaning of R. S. § 1979. Consistency requires the application of a similar principle where, as here, the asserted misconduct is attributed to a Metropolitan Police officer in the performance of law enforcement functions in the federal city.[8] Cf. *Penn Bridge Co.* v. *United States*, 29 App. D. C. 452, 457 (1907). In each case, the actions occur under color of federal law and, as such, cannot be brought within the ambit of that enactment. Contrary to the ruling of the court appeals, therefore, the District's federal character strengthens rather than weakens the proposition that, as a congressionally-created municipal corporation, it is not a "person" within the purview of R. S. § 1979.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the court below, to the extent that it holds the

---

[8] Under the Federal Tort Claims Act, the United States government has been specifically exempted from liability for international torts like that alleged here. See 42 U. S. C. § 2680(h). The District urged to the court of appeals that its tort liability should not be measured by more stringent standards than those applicable to the United States conformably with the proposition that, because municipal immunity is an extension of sovereign immunity, a municipality's tort liability should not be broader in scope than that of the sovereign from which municipal powers are derived. See *Bernardine* v. *City of New York*, 294 N. Y. 361, 62 N. E. 2d 604, 606 (1945); *Kelso* v. *City of Tacoma*, 63 Wash. 2d 913, 390 P. 2d 2, 5 (1964); *Perkins* v. *State*, 252 Ind. 549,251 N. E. 2d 30, 34 (1969); Vanlandingham, *Local Governmental Immunity Re-Examined*, 61 Northwestern L. Rev. 237, 253-254, 262 (1966). However, the court rejected that contention (C. A. at 13a-14a) and on February 17, 1972, the District of Columbia Court of Appeals made a similar ruling in *Graves* v. *District of Columbia*, —— A. 2d —— (D. C. App. No. 5086), with Judge Nebeker dissenting. A petition for rehearing en banc is being prepared for filing in *Graves*.

District of Columgia amenable to an action for damages in the United States District Court for the District of Columbia under R. S. § 1979, should be reversed.

C. Francis Murphy,
Corporation Counsel, D. C.

Richard W. Barton,
Assistant Corporation Counsel, D. C.

David P. Sutton,
Assistant Corporation Counsel, D. C.

Attorneys for Petitioner
District Building,
Washington, D. C. 20004